

No. 11854

IN THE

United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

SCHICK SERVICE, INC., a corporation, and SCHICK, INC.,
a corporation,

Appellants,

vs.

RALPH E. JONES,

Appellee.

APPELLEE'S BRIEF.

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APPELLEE'S BRIEF.

INTRODUCTION.

This is appellee Jones' answer to the Opening Brief for defendants-appellants in the appeal by defendants from the judgment in this action in plaintiff's favor.

COUNTER-STATEMENT OF THE CASE.

The "Statement of the Case" in the Opening Brief for defendants-appellants (p. 3 *et seq.*) is in many respects inadequate, incomplete, and erroneous, and is controverted by the appellee Jones. Defendants' "Statement of the Case" does not appear to comply with Rule 20(c) of this Court, as it seems to be largely argument. For the convenience of the Court, however, we shall present under this same title plaintiff's "Statement" of the facts referred to in defendants' brief. Appellants are designated herein as "defendants," and appellee is designated as "plaintiff."

The Issues.

Broadly stated, the only issues on defendants' appeal are the validity and infringement of claims 22, 23, 31 and 32 of the Jones patent in suit, No. 2,228,768. More specifically, as stated in defendants' Opening Brief (pp. 3-4), the issues on this appeal are as follows:

(a) Was the invention of the patent in suit, No. 2,228,768, defined by claims 22, 23, 31 and 32 thereof, described in any printed publication prior to the invention or discovery thereof by plaintiff?

(b) Is plaintiff the original and first inventor of any material or substantial part of the invention claimed in claims 22, 23, 31 and 32 of patent No. 2,228,768 in suit?

(c) Does the invention covered by claims 22, 23, 31 and 32 in patent No. 2,228,768 in suit constitute patentable novelty or invention in view of the state of the art and common knowledge in the art prior to plaintiff's invention?

(d) Do defendants' dry shavers, exemplified by Plaintiff's Exhibits 2, 3, 4 and 5 infringe claims 22, 23, 31 and 32 of patent No. 2,228,768 in suit?

In addition, defendants attempt to raise a further defense, *i. e.*, that claims 22, 23, 31 and 32 on appeal are invalid for indefiniteness, defendants' counsel alleging that they fail to comply with 35 U. S. C. A. §33 (R. S. §4888) (Opening Brief, Point IV, p. 26). It is submitted, however, that defendants have waived this defense and that it is not an issue in defendants' appeal in view of the following facts: (1) This defense is not pleaded by defendants in either of their Answers [Tr. 4, 12];

(2) defendants did not suggest to the District Court any finding on this issue; (3) defendants did not specify this issue as a point on appeal under Rule 75(d) of the Rules of Civil Procedure [Tr. 78-86]; (4) defendants did not specify this issue as a point on appeal in accordance with Rule 19(6) of this Court; and (5) defendants have not specified this issue in their "Specification of Errors" in their Opening Brief (p. 16), as required by Rule 20(d) of this Court.

The Invention of the Patent in Suit.

The patent in suit, No. 2,228,768, states that it covers improvement in electric dry shavers of the well-known Schick type [R. 425, Col. 1, lines 1-12]. A sample of such conventional Schick dry shavers is in evidence as Defendants' Exhibit I. A number of such improvements disclosed in the patent in suit (*e. g.*, the combinations defined by claims 2, 3, 4, 5, 6, 7, 8, 9, 10, 12, 13, 14, 15, 16 and 21) are not involved in this action, and need not be considered by the Court.

A major difficulty with conventional dry shavers prior to the invention of the patent in suit was that the cutting heads thereof were provided with relatively sharp corners and edges at each end of the cutting head, which were very uncomfortable to the users. This difficulty is described in the patent in suit [Tr. 425, Col. 1, lines 13-23; Tr. 426, Col. 2, lines 36-42], and was explained in the testimony [Tr. 152-154, 171]. The members of this Court can readily demonstrate this for themselves by shaving with any of the conventional dry shavers in evidence, as exemplified by Defendants' Exhibits B, F, H and I, none of which includes the invention in suit. Before de-

fendant Schick, Inc., started to use the invention in suit it made and sold over 1,700,000 conventional dry shavers [Tr. 359].

Defendants stress the fact that the patent in suit discloses a dry shaver in which “end guards” are provided to lock the cutting head of the shaver relative to the handle (Opening Brief, pp. 6-7, 32). Although this improvement is covered by a number of claims of the patent (*e. g.*, 2, 3, 8, 9), the defendants’ infringing shavers do not provide any locking between the end guards and the cutting head, and neither such claims nor such improvement is involved in this action. The patent in suit makes it plain that such improvement may be omitted if desired in practicing the invention [Tr. 427, Col. 1, lines 32-36]. consequently, defendants’ statements with regard to such improvement which is not involved in this action are immaterial and need not be considered by the Court.

The patent in suit solved the difficulty of such discomfort in conventional electric dry shavers by providing in combination therewith “end guards” (numbered 20 in the patent), the resulting combination having the following features:

- (a) The patented end guards are *hinged to the handle* of the conventional dry shaver at the ends of the cutting head thereof; and
- (b) The patented end guards, at their outer ends, are *rounded*.

The advantages of the patented construction are clearly set forth in the patent in suit as follows:

“It will be seen that I have secured the following advantages by my construction:

“First, comfort for the person whose beard is being clipped or shaved;

“Second, security against interruption of the mechanical functioning of the clipping machine;

“Third, security against damage to fragile and expensive parts;

“Fourth, ease in disassembling for cleaning and ease in reassembling the parts, and

“Fifth, neatness in construction and appearance.”

A further advantageous result obtained by the use of such rounded end guards on a dry shaver is that the user can obtain a much faster shave than would otherwise be possible. The District Court so found, stating:

“By the invention of the patent in suit, the skin of the user is protected against the relatively sharp edges and corners on the ends of the shaving head, and this provides substantial shaving comfort to the user *which in turn permits a faster shave than would otherwise be possible, which is highly desirable.*” [Tr. 53.] (Emphasis added.)

Colonel Jones, the plaintiff, testified that by the use of such rounded end guards or “whiskits” on the defendants’ “Colonel” shaver [Plaintiff’s Exhibit 3], he was able to reduce his shaving time from about *twenty* minutes to about *three* minutes as compared with earlier conventional Schick shavers [Tr. 152-153], and that even with the late model “Colonel” shaving time is cut in half by the use of the endguards or “whiskits” [Tr. 154]. This testimony of the plaintiff was not refuted or questioned by the defendants. That it is a fact can be readily demonstrated by the members of this Court by shaving with de-

fendants' "Colonel" shaver [Plaintiff's Exhibit 3], first with the end guards in their ordinary closed position, and then removed from the exhibit and comparing the shaving time required in each instance. That the rounding of the end guards of the device in suit provides a substantial advantage is confirmed by the fact that defendant Schick, Inc., has always rounded its end guards of "whiskits" both longitudinally and transversely, although such rounding is not necessary to provide a simple whisker receptacle [Tr. 381-383].

A further advantageous result obtained by such *rounded* end guards is that they enable the user to obtain a *closer* shave. This is pointed out in the defendants' patent to Meyer [Exhibit L-2], which defendants admit describes the purpose of their "whiskits" (Opening Brief, p. 37), and which states as follows:

"The wall sections 11 and the plates 10 present *rounded surfaces* of the respective opposite ends of the head 6, which surfaces, as shown in Fig. 1, serve to work the skin of the face or other part of the body being shaved as to permit the obtaining of a smooth even shave without irritation to the skin. Thus *by such a construction, the valve plate 10 removes that objection to this particular type of head structure for electric razors, such types of head structure by reason of the squared end being objectionable, in that they tend to irritate the skin and to not permit the user to obtain as close and even a shave as is desirable.*" [Tr. 461, Col. 2, lines 41-54.] (Emphasis added.)

The third advantage of the patented construction as stated in the patent, *supra*, is that the end guards protect the ends of the fragile cutting head against damage. This

was pointed out as a practical advantage by Colonel Jones, the plaintiff [Tr. 155], and defendants' witness Quasnovsky pointed out the fact that Exhibit B, one of defendants' conventional shavers, had suffered such an injury to the cutting head [Tr. 303]. The importance of this protective feature will be appreciated from the fact that the slotted shear plate of the cutting head of a Schick dry shaver is only 3/1000ths of an inch thick [Tr. 356], or about the thickness of a piece of paper [Tr. 354], and even the thickened reinforced portions at the ends of the cutting head are only about 18/1000ths of an inch thick [Tr. 356].

The fourth advantage as stated in the patent in suit, *supra*, is the provision of ease of disassembling the device for cleaning and ease in reassembling the parts. It was admitted by defendants' witness, Mr. Gray, that by *hinging* the end guards or "whiskits" of defendants' shavers *to the handle* this cleaning operation is greatly facilitated and is an important advantage [Tr. 388].

It will thus be appreciated that in the invention of the patent in suit the provision of separate end guards which are rounded to increase shaving efficiency and to provide shaving comfort and to thereby reduce the shaving time of the user is of paramount importance, but that the patented construction also derives additional important advantages by mounting the end guards *on the handle*, and by *hinging* them to the handle.

The District Court found as follows:

"The invention of patent No. 2,228,768 is an improvement on prior types of dry shavers and has provided a substantial contribution to the art of dry shavers. It is entitled to be liberally construed and interpreted." [Tr. 53.]

This is plainly established by the evidence. The record shows that since the issuance of the patent in suit the sales of the defendant Schick, Inc., of the alleged infringing devices has amounted to approximately \$20,350,000.00 [Tr. 70-71]. What greater tribute could be paid to an invention than infringement on such a large scale?

The defendants' recognition of the great value and importance of the invention in suit is attested not only by their extensive commercial appropriation of the invention, but it is further evidenced by the fact that immediately after the issuance of the patent in suit defendant Schick, Inc., offered plaintiff \$50,000.00 in cash for the patent [Finding 22, Tr. 55]. When plaintiff declined to sell his patent, defendant Schick, Inc., then negotiated with the plaintiff an exclusive license thereunder for which it agreed to pay plaintiff in cash the sum of \$30,000.00 as an advance against royalties, a royalty of $1\frac{1}{2}\%$ on the sales price of all shavers sold by it embodying the invention until such royalties should total \$250,000.00, and thereafter a royalty of 1% of such sales price for the life of the patent in suit [Finding 23, Tr. 55-56]. Such action by defendant Schick, Inc., was partially by its general counsel, Mr. Merrick, and, certainly, with the full knowledge of its patent counsel, Mr. Hicks [Tr. 260-261]. What greater recognition of validity and infringement could there be by a defendant than that in this case, where the large defendant corporation, which has net assets in excess of \$2,000,000.00 [Tr. 70], has offered such a sum for the patent in suit and then took a license at such a substantial royalty obligation?

Only four claims of the patent in suit are involved in this appeal, *i. e.*, claims 22, 23, 31 and 32. The District

Court held each of these claims valid, and infringed by each of the Schick dry shavers exemplified by Plaintiff's Exhibits 2, 3, 4 and 5 [Tr. 59-60]. Such claims are copied herewith in full:

"22. A device of the class described having an open-ended channeled head, and rounded guard elements hinged to the device at the opposite ends of said head.

"23. A device of the class described including a handle, an open-ended channeled head, a cutter within the head, and rounded guard elements at the open ends of said head, said elements being hinged to said handle.

"31. An electric razor structure having a head provided with a chamber opening through the respective opposite ends of the head, and end flaps for said chamber hinged to said structure adjacent said ends of the head.

"32. An electric razor structure having a head provided with a chamber opening through the respective opposite ends of the head, and end flaps for said chamber hinged to said structure adjacent said ends of the head, said end flaps having rounded upper sections forming rounded end extensions and bearing surfaces for the razor head."

As will be apparent, claims 22, 23, 31 and 32 of the patent in suit are all combination claims, each defining a combination of mechanical elements. All are specifically limited to an electric razor construction in which separate end guards (or "flaps," as they are termed in claims 31 and 32) are provided at each end of the cutting head, which are *hinged to the body (or handle)* of the structure. All, except claim 31, are specifically limited in

terms to the end guards being *rounded*, it being noted that claim 32 in addition locates the *rounding* at the upper sections of the end guards so as to form rounded end extensions and bearing surfaces for the razor cutting head.

As will also be apparent, the claims on appeal are not for simply “rounding” or simply “hinging” an old element in an old combination of elements, as apparently contended by defendants. If that were all that is involved in the invention, we would not now be before this Court. The claims are, in fact, each for a *new* combination of elements which have the *new* attributes and features defined by the claims. Plaintiff by his patent in suit did not merely change by a matter of degree the shape of any element of a conventional dry shaver. Plaintiff defines a *new* combination of mechanical elements by each of the claims on appeal.

The Infringing Devices.

Defendants’ infringing devices are exemplified by Plaintiff’s Exhibits 2, 3, 4 and 5, and the application of the claims on appeal to Exhibit 3 is illustrated by the charts, Plaintiff’s Exhibits 21-G, 21-H, 21-P and 21-Q [Tr. 163-168], which may be helpful to the Court. The claims on appeal, of course, are similarly applicable to defendants’ shavers exemplified by Exhibits 2, 4 and 5.

The District Court found as follows:

“All of such shavers made and sold by defendants are provided with a device at each end of the cutting head of the shaver and referred to by defendants as a ‘whiskit.’ The ‘whiskits’ in Exhibits 2, 3, 4 and 5 are provided for the same purpose as the end guards 20 of the patent No. 2,228,768 in suit, and by reason thereof accomplish the same result, *i. e.*, the provi-

sion of shaving comfort and a faster shave to the user and permit ready disassembly of the shaving head and cleaning of the device . . . Such 'whiskits' on defendants' shavers are the full mechanical equivalent of the end guards 20 of patent No. 2,228,768 in suit, and infringe each of claims 22, 23, 31 and 32 of said patent." [Tr. 54.]

Such finding by the District Court is self-evident from a reading of the patent in suit and a study of defendants' shavers, Exhibits 2, 3, 4 and 5. Furthermore, defendants admit (Opening Brief, p. 43) that their infringing shavers are manufactured under the Meyer patent No. 2,066,214 [Exhibit L-2, Tr. 458], which states, as to the rounded end guards 10 shown therein that they function to provide shaving comfort as well as to provide a closer and smoother shave. The defendants directly admit that "The patent to Meyer describes the purpose of the 'whiskits' of defendants' accused shavers." (Opening Brief, p. 37.) It is submitted that defendants' current argument that their "whiskits" do not provide shaving comfort comes with ill grace in view of the above-quoted plain statement from their Meyer patent as to the function of such "whiskits," and their admission with regard thereto.

Defendants also argue that because they make their end guards or "whiskits" hollow they thereby provide a whisker receptacle for the beard clipping, which the end guards of plaintiff's patent cannot do, and thereby avoid infringement. As will be apparent to this Court, and as will be pointed out hereinafter, such an argument is immaterial even if true. However, the evidence shows that this assertion by defendants is not true. Thus, while

Mr. Gray, chief engineer of defendant Schick, Inc., testified unequivocally on direct examination that the end guards 20 of the patent in suit would not serve as beard clipping catchers [Tr. 360], upon cross-examination he admitted that such end guards of the patent in suit will retain *some* of the beard clippings [Tr. 388].

The Prior Art.

The District Court found as follows with regard to the prior art relied upon by defendants:

“ . . . None of said exhibits introduced in evidence by defendants disclose the construction set forth in patent No. 2,228,768. None of such prior art exhibits describe or disclose or suggest a dry shaver wherein the principle, mode of operation, or results attained are equivalent to those of patent No. 2,228,768. Of such prior art patents introduced into evidence by the defendants, Exhibits L-9, L-11, L-12, L-13, L-14, L-15, L-16, L-17 and L-18 were all file-wrapper references considered by the Patent Office in connection with the patentability of the invention covered by patent No. 2,228,768, and none of the other of said prior art patents, nor the catalogue Exhibit M, nor the paper punch Exhibit N, any more nearly disclose the invention in suit than do such prior art patents considered by the Patent Office. All such prior art exhibits introduced into evidence by defendants have so little in common with the invention of patent No. 2,228,768 here in suit as to merit no special separate findings with regard to them.”
[Tr. 51.]

Plaintiff submits that even a cursory study of such “prior art” will conclusively establish its lack of pertinency

and that the District Court's finding, quoted above, should be sustained.

The only prior art referred to in defendants' Opening Brief is as follows:

Bernard Patent, No. 765,954 [Exhibit L-19, Tr. 550];

The paper punch, Exhibit N;

The McGill catalogue, Exhibit M;

Peterson Patent, No. 1,744,280 [Exhibit L-4; Tr. 470];

Ventimiglia Patent, No. 1,801,889 [Exhibit L-5; Tr. 474];

Friedman Patent, No. 1,516,635 [Exhibit L-6; Tr. 478];

Szabo Patent, No. 1,175,023 [Exhibit L-7; Tr. 484];

Dean Patent, No. 2,014,882 [Exhibit L-8; Tr. 490];

Aaron Patent, No. 1,970,518 [Exhibit L-11; Tr. 512].

No other prior art is referred to by defendants and, consequently, our remarks are limited to the art listed above and the Court may disregard the other prior art patents formerly relied upon by defendant.

Defendants rely heavily upon the ancient "conductor's" punch, shown in the Bernard patent [Exhibit L-19], the McGill catalogue [Exhibit M], and illustrated by the sample punch [Exhibit N]. Such art does not relate to shaving or clipping devices, and there is no suggestion in it

that the punch receptacles thereof could be used in any way with a dry shaver. As a matter of fact, such punch receptacles could not be used on a conventional dry shaver to accomplish the purpose of the patent in suit without substantial changes not suggested in the art. For example, in the Bernard patent the receptacle L is provided with a sharp "projecting flange or lip P," which could not be used on a dry shaver as it would *increase* the discomfort of the conventional shaver. Furthermore, in none of the art is there any question of comfort to the user, and any rounding of the punching receptacle is purely **incidental**. Also, in none of such art is there any conformity of the outline of the punching receptacle to the outline of any other element. Furthermore, in none of such art is the punching receptacle hinged to a *handle* of the punch, in each case being connected merely to the punch *jaws*.

Defendants also rely heavily upon the Peterson patent [Exhibit L-4] which shows an ordinary safety razor of the Gillette type. What this has to do with the invention of the patent in suit we cannot conceive. The Peterson patent, obviously, does not show a dry shaver, or anything that could be put upon a dry shaver to accomplish the purpose of the invention here in suit. Certainly, the curved top 1 of the Peterson patent could not by any stretch of the imagination be applied to a dry shaver. The Peterson patent, obviously, does not show or suggest separate rounded end guards disposed at each end of the cutting head of a dry shaver, which are hinged to the handle thereof.

The patents to Friedman [Exhibit L-6], Szabo [Exhibit L-7], and Dean [Exhibit L-8] all re-

late to hair clipping or cutting devices, none of which shows or suggests the provision of separate rounded end guards for the cutting head of a dry shaver, and none shows or suggests plaintiff's conception of *hinging* such end guards *to the handle* of such a dry shaver.

The patent to Ventimiglia [Exhibit L-5] likewise has no pertinency, merely showing a tubular clipper for nostril hairs. Plainly, it does not show or suggest the use of separate end guards on a conventional dry shaver at each end of the cutting head, or that such end guards should be *rounded*, or that such end guards should be *hinged to the handle* of the shaver.

All of such prior art patents go back a long way in the art. The Bernard patent [Exhibit L-19] issued in 1904, and the Szabo patent [Exhibit L-7] issued in 1916. Yet there is no contention by defendants that any of such prior art patents inspired the use of defendants' "whiskits."

SUMMARY OF ARGUMENT.

Point 1. Claims 22, 23, 31 and 32 embody invention and are valid.

Point 2. The patent in suit points out and distinctly claims the invention in suit.

Point 3. Defendants' accused shavers infringe claims 22, 23, 31 and 32.

Point 4. The District Court properly rejected the testimony of the witnesses Quasnovsky and Gray.

Point 5. The District Court properly held that the infringement of defendants was "conscious, deliberate, wilful, and wanton."

ARGUMENT.

POINT 1.

Claims 22, 23, 31 and 32 Embody Invention and Are Valid.

Defendants in their Opening Brief argue that there is no invention in “rounding” alone (pp. 8-12, 19-21) or in “hinging” alone (pp. 22-24). Such arguments are, of course, immaterial even if true because the claims on appeal do not cover either feature alone. All of the claims on appeal are combination claims. Under the law, it is presumed that every individual element of a combination claim is old in the art.

Contrary to the defendants’ assertion (p. 25), the District Court did not determine that either “rounding” or “hinging” is not patentable. The District Court held valid claim 31 which is not limited in terms to any “rounding.”

Defendants’ arguments, however, are false, because:

(a) It is novel and inventive in the art to provide separate end guards for the ends of the cutting head of a dry shaver, which are *rounded and which conform to the general shape of the ends of the cutting head*; and

(b) It is novel and inventive in the art to provide separate end guards for the ends of the cutting head of a dry shaver, which are *hinged to the handle* of the dry shaver adjacent the ends of the head.

These points are discussed briefly as follows:

(a)

There is no prior art of record in this case which shows or suggests the provision of separate end guards for any shaving or hair clipping or cutting device, which are rounded to conform to the general shape of the ends of a cutting head of the device. Consequently, the novelty of such a construction must be undisputed.

That such a construction was not obvious to a "man skilled in the art" is strongly evidenced by the fact that defendant Schick, Inc., made and sold over 1,700,000 dry shavers over a period of years without the inclusion of such improvement before it finally adopted it [Tr. 359]. If such an improvement is now "obvious," as contended by defendants, why was it that it was never "obvious" to the engineering department of the defendant Schick, Inc., a large corporation? It will be remembered that defendants do not assert that their "whiskits" were inspired by any of such prior art here relied upon. In fact, defendants' attorney actually represented to the District Court that defendants' "whiskits" were made only after it saw the patent to Meyer [Exhibit L-2] (which was filed subsequent in date to the patent in suit), as follows:

"Mr. L. S. Lyon: No. This patent to Meyer, which was what inspired these whisk-its, was applied for in August, 1936." [Trial Court, R. 39.]

Also, although defendants' chief engineer, Mr. Gray, admitted that, while it is not necessary in providing a

mere whisker receptacle (as defendants contend that they do) to round such “whiskits” longitudinally and transversely, still this is a very desirable feature and the defendant Schick, Inc., has always done so [Tr. 382-383].

Defendants have always slightly rounded or beveled the corners and edges of the *cutting head itself* in their conventional type of dry shavers, as is usual in the manufacture of metal products, by buffing and polishing during manufacture. Such “rounding,” however, is so minute that it can scarcely be discerned with the naked eye or felt with the finger [*see* the conventional Schick shavers in evidence, Exhibits B, F, H, and I]. Throughout their Opening Brief (pp. 8-13) defendants seek to confuse such minute “rounding” and beveling of the cutting head itself with the rounded end guards of the patent in suit. We are confident that this Court will not look with favor upon any argument by defendants that such buffing of the cutting head itself provides any structure in any way similar to that of the end guards of the patent in suit. Such buffing obviously does not provide the shaving comfort, or speed of shave, or closeness of shave provided by the invention of the patent in suit, nor does it provide any *separate* rounded end guards which are *hinged to the handle*, as specified by the claims on appeal. Such conventional manufacturing practice by defendant Schick, Inc., never suggested to it the provision of its “whiskits” and, therefore, the invention in suit cannot be regarded as obvious therefrom to one skilled in the art.

(b)

There is no prior art of record in this case which shows or suggests the provision of separate end guards for any shaving or hair clipping or cutting device, which are *hinged to the handle* of the shaver adjacent the ends of the cutting head. The novelty of such a construction must be undisputed. That such construction involves invention is amply established by the evidence which is herewith briefly reviewed.

First, such construction never occurred to defendant Schick, Inc., from the prior art, as pointed out above with regard to improvement (a) and, consequently, cannot be even plausibly argued by defendants as “obvious” from such prior art to a man skilled in the art. If Mr. Gray, who has been with defendant Schick, Inc., since 1934, and his extensive engineering department, are not men skilled in the dry shaver art, who would be?

Secondly, defendant Schick, Inc., has always hinged its “whiskits” to the handles of its dry shavers [Tr. 390]. That such construction is not essential is established by defendant’s Meyer patent [Exhibit L-2] which shows the “whiskits” connected to, not the handle, but the ends of the cutting head itself. That hinging the guards to the handle is very desirable is also established by the testimony of Mr. Gray upon cross-examination as follows:

“Q. Mr. Gray, is there any advantage in the Schick shavers in having the whisk-its hinged to the shaver, to the body of the shaver as is illustrated by these Exhibits 3, 4 and 5?

“A. As compared to what?

“Q. As compared to having them permanently attached to the shaver in a rigid position?

“A. Well, yes; because if they were attached in a rigid position, to empty them with require removal of the shearing head. We consider that a fragile article that should be handled as little as possible. Therefore the hinged ones would be an advantage.

“Q. So that that is an advantage of the whisk-its on the Schick shavers?

“A. As compared to one that was permanently fastened, yes.” [Tr. 388.]

It is well established that where a defendant pays tribute to a construction by extensive appropriation after a long-felt need in the art it is substantial evidence of invention. See: *Hoeltke v. C. M. Kemp Mfg. Co.*, 80 F. (2d) 912, 919 (C. C. A. 4th, 1936; cert. denied 298 U. S. 673); *Steiner Sales Co. v. Schwartz Sales Co.*, 98 F. (2d) 999, 1005 (C. C. A. 10th, 1938; cert. denied 305 U. S. 662); *General Electric Co. v. United States Electric Mfg. Co.*, 63 F. (2d) 764, 766 (C. C. A. 2d, 1933); *Matthews v. Koolvent Metal Awning Co.*, 158 F. (2d) 37, 38-39 (C. C. A. 5th, 1946).

It is also well established that where a new combination produces new and beneficial results, as does the invention of the patent here in suit, it is strong evidence of invention. This is the old rule of *Loom Co. v. Higgins*, 105 U. S. 580, quoted very recently by this Court in *Bianchi v. Barili*, F. (2d), 78 U. S. P. Q. (Adv. Ops.) 5, 9 (June 15, 1948), as follows:

“‘At this point we are constrained to say that we cannot yield our assent to the argument, that the combination of the different parts or elements for

attaining the object in view was so obvious as to merit no title to invention. Now that it has succeeded, it may seem very plain to any one that he could have done it as well. This is often the case with inventions of the greatest merit. It may be laid down as a general rule, though perhaps not an invariable one, that if a new combination and arrangement of known elements produce a new and beneficial result, never attained before, it is evidence of invention. It was certainly a new and useful result to make a loom produce fifty yards a day when it never before had produced more than forty; and we think that the combination of elements by which this was effected, even if those elements were separately known before, was invention sufficient to form the basis of a patent.' ”

To the same effect, *see: Bliss v. Spangler*, 217 Fed. 394, 397 (C. C. A. 9th, 1914); *Wire Tie Machine Co. v. Pacific Box Corp., Ltd.*, 102 F. (2d) 543, 552 (C. C. A. 9th, 1939); *Hydraulic Press Mfg. Co. v. Ralph N. Brodie Co.*, 51 Fed. Supp. 202 (Aff'd 151 F. (2d) 91; C. C. A. 9th, 1945).

It is therefore respectfully submitted that claim 31 on appeal, which is not limited in terms to rounded end guards, but which is limited to a shaver structure having the end guards (or “flaps”) *hinged* to the structure (or handle) adjacent to the *ends of the cutting head*, clearly defines an invention and is valid over the prior art.

Plaintiff's case is even stronger as to claims 22, 23 and 32 on appeal, because these claims are limited not only to the provision of end guards hinged to the handle, but are also limited to the end guards being rounded. Defendants' argument to the effect that, if all of the elements

of a combination are old the combination is unpatentable, is fallacious on its face. As pointed out above, all the elements of a combination claim are presumed in the law to be old.

That claims 22, 23, 31 and 32 define true patentable combinations is self-evident. There can be no question that the end guards of the patent in suit cooperate with both the cutting head and the handle of the dry shaver, being hinged to the handle and forming end extensions and bearing surfaces for the cutting head. By the provision of such end guards, the ends of the cutting head are protected against injury. By hinging the end guards to the handle, the dry shaver may be readily disassembled for cleaning and reassembled and unnecessary handling of the cutting head obviated. By rounding the end guards as described in the patent, shaving comfort is provided to the user. Thus, each of these features of construction modifies the general function of the end guards, and each feature modifies the other.

Defendants argue that a mere selection of well-known elements and combining them together in a device to not constitute invention, citing a number of decisions of this Court (Opening Brief, p. 25). We agree with this rule of law, but submit that it has no application to the facts of the present case. As shown above, the inventive elements of the claims on appeal are all *novel*, none of them being shown in the prior art.

Invention in the claims of the patent in suit is also strongly evidenced by the initial eagerness of defendant Schick, Inc., to buy it for \$50,000.00, obviously upon advice of its counsel, and by the subsequent eagerness of Schick, Inc., to acquire an exclusive license under the

patent in suit upon substantial royalty terms. See: *Inland Mfg. Co. v. American Wood Rim Co.*, 14 F. (2d) 657, 659 (C. C. A. 6th, 1926); *Motor Improvements, Inc. v. General Motors Corp.*, 49 F. (2d) 543, 545 (C. C. A. 6th, 1931); *Cookson v. Louis Marx & Co.*, 23 Fed. Supp. 615, 618 (D. C. N. Y. 1938).

The prior art relied upon by defendants in this case, and particularly the art relating to "conductor's" punches, falls within the rule of *Topliff v. Topliff*, 145 U. S. 156, 161, as stated by this Court in *Bianchi v. Barili*, *supra*, as follows:

"It is not sufficient to constitute an anticipation that the device relied upon might, by modification, be made to accomplish the function performed by the patent in question, if it were not designed by its maker, nor adapted, nor actually used, for the performance of such functions."

Finally, defendants have wholly failed to carry their burden of proof as to alleged invalidity of the patent in suit, and its validity is strengthened by the finding of the District Court. This rule was stated by this Court recently in the case of *Bianchi v. Barili*, F. (2d), 78 U. S. P. Q. (Adv. Ops.) 5, *supra*, at page 6, as follows:

"At the outset it should be observed that 'the grant of letters patent is *prima facie* evidence that the patentee is the first inventor of the device described in the letters patent and of its novelty' . . .

"Before a patent can be declared invalid because of anticipation its lack of novelty must be established *beyond a reasonable doubt* . . .

“Particularly heavy is the attacker’s burden *when the validity of the patent has been sustained by court findings.*” (Emphasis added.)

In view of the novelty and utility of the constructions defined by claims 22, 23, 31 and 32, the widespread use of these constructions by the defendants, and the acquiescence of defendant Schick, Inc., in the validity of the patent (as evidenced first by its offer to purchase the patent and then by its negotiating an exclusive license under the patent), it is submitted that the claims on appeal plainly define inventions and are valid.

POINT 2.

The Patent in Suit Points Out and Distinctly Claims the Invention in Suit.

As pointed out above, defendants have waived any defense of lack of compliance of the patent in suit with 35 U. S. C. A. §33 (R. S. §4888). However, defendants’ argument will be briefly answered herein, without prejudice.

First, the decisions relied upon by defendants (Opening Brief, p. 26) are not in point. In both the *General Electric Case* and the *Farmers Co-operative Exchange Case*, the claims defined a composition of matter, whereas the claims here on appeal are for combinations of mechanical elements. In both of such decisions, the only novelty in the claims was stated in functional language, which is not true of the claims on appeal here. Excluding consideration of the word “rounded” in the claims on appeal, they still fully distinguish from the prior art in this case because they all in effect specify end guards for a dry

shaver (new in the art), that such guards are at the opposite ends of an open channeled head (new in the art), that such guards are hinged (new in the art), and that such guards are hinged to the handle (new in the art). Certainly, there is nothing “functional” about any of such limitations, and any argument by defendants that the claims on appeal distinguish from the art solely in functional statements is obviously without merit.

It is to be noted, however, that even the word “rounded” is not “functional.” It is descriptive of the shape and contour of the end guards, just as the words “square” or “pointed” would be. Obviously, it is not the purpose of a patent to state physical dimensions, as the size of the parts may be varied without departing from the spirit of the invention. The only requirement of the statute (35 U. S. C. A. §33) and the law is that the claims, when read in the light of the specification and drawing, are sufficiently definite to enable a man skilled in the art to practice the invention. That such is the case as to the present patent is plainly demonstrated by the fact that Mr. Gray, chief engineer of defendant Schick, Inc., had no difficulty in making a model of the device of the patent in suit, Exhibit A [Finding 12, Tr. 50, 361].

It is submitted that all of the claims on appeal are definite within the meaning of 35 U. S. C. A. §33 in view of the following decisions, some of which are quoted at length in Opening Brief of Cross-Appellant on file in this case. See: *Ralph N. Brodie Co. v. Hydraulic Press Mfg. Co.*, 151 F. (2d) 91 (C. C. A. 9th, 1945); *Research Products Co. v. Tretolite Co.*, 106 F. (2d) 530 (C. C. A. 9th, 1939); *Paul E. Hazekinson Co. v. Wilcoxon*, 149 F. (2d) 471 (C. C. A. 5th, 1945); *Schick Dry Shaver, Inc. v. R.*

H. Macy & Co., Inc., 111 F. (2d) 1018 (C. C. A. 2nd, 1940); *Chicago Pneumatic Tool Co. v. Hughes Tool Co.*, 97 F. (2d) 945 (C. C. A. 10th, 1938); *Strong-Scott Mfg. Co. v. Weller*, 112 F. (2d) 389 (C. C. A. 8th, 1940); *Westco-Chippewa Pump Co. v. Auto-Prime Pump Co.*, 57 F. (2d) 556 (D. C. Ohio, 1931).

POINT 3.

Defendants' Accused Shavers Infringe Claims 22, 23, 31 and 32.

The District Court held that claims 22, 23, 31 and 32 of the patent in suit are all infringed by each of defendants' devices, Exhibits 2, 3, 4 and 5 [Tr. 59-60]. Obviously, this holding should be affirmed.

The defendants argue that because they do not use their "whiskits" to hold the cutting head on their shavers they do not infringe (Opening Brief, pp. 32-34). This argument is obviously immaterial because: (a) such feature is not specified in any of the claims on appeal; and (b) the patent in suit expressly states that such feature may be omitted if desired [Tr. 427, Col. 1, lines 32-36]. Even if narrowly interpreted, the claims on appeal read directly upon all of the defendants' accused devices. Defendants ask this Court to read into the claims on appeal elements which are immaterial to the issues in this case, but they cite no authority for such a novel proposition. In fact, the law is to the contrary. See: *McCarty v. Lehigh Valley R. R. Co.*, 160 U. S. 110, 116, 40 L. Ed. 358, 361; *White v. Dunbar*, 119 U. S. 47, 30

L. Ed. 303; *Magnavox Co. v. Hart & Reno*, 73 F. (2d) 433, 438 (C. C. A. 9th, 1934).

Next, the defendants argue (pp. 34-37) that because all of the accused devices have thickened reinforcing portions at the ends of and integral with their cutting heads, there is no infringement because the patent in suit does not show such reinforcing portions, and the Schick dry shavers have always had them. The patent in suit, however, is perfectly plain to the effect that the improvements thereof are to be applied to the conventional Schick shavers (p. 1, Col. 1, lines 1-17), which defendants admit had such reinforcing portions on the cutting heads. Furthermore, in defendants' shavers the upper ends of the rounded end guards or "whiskits" plainly merge with the flat face of the cutting head. This is clearly shown in Fig. 1 of defendants' Thomas patent [Exhibit L-3] and is shown in the photographs of defendants' "Colonel" shaver in evidence [Exhibits 16 and 18]. Even if the defendants had added such reinforcing portions to the cutting heads of their shavers after the filing of the application for the patent in suit, it would still not avoid infringement, because, under the law, the mere addition of extra parts to a patented device does not avoid infringement. See: *Stebler v. Riverside Heights Orange Growers' Ass'n*, 205 Fed. 735, 739 (C. C. A. 9th, 1913); *Angelus Sanitary Can Co. v. Wilson*, 7 F. (2d) 314, 318 (C. C. A. 9th, 1925); *Chesapeake & O. Ry. Co. v. Kaltenbach*, 95 F. (2d) 801, 804 (C. C. A. 4th, 1938); *Kelley-Koett Mfg. Co. v. McEuen*, 130 F. (2d) 488, 492 (C. C. A.

6th, 1932); *Butler v. Burch Plow Co.*, 23 F. (2d) 15, 27 (C. C. A. 9th, 1927). Defendants' argument relative to the Aaron patent [Exhibit L-11] is grossly misleading, because the question before the Patent Office in that connection was whether the reinforcing portions of Aaron cutting heads were the equivalent of plaintiff's end guards, and the Patent Office resolved this question in plaintiff's favor by allowing the claims in suit. In any event, it is established by this Court that mere statements by a patent solicitor in a patent file wrapper do not create any estoppel. See: *Fullerton Walnut Growers' Ass'n v. Anderson-Barngrover Mfg. Co.*, 166 Fed. 443 (C. C. A. 9th, 1908).

Lastly, defendants argue that their end-guards or "whiskits" do not achieve shaving comfort as to the end guards of the patent in suit, and that, in fact, their "whiskits" have an entirely different function, *i. e.*, "to collect beard clippings" (pp. 37-38). It is submitted that the first proposition simply is not true, and that the second one is immaterial. For defendants to contend that their "whiskits" do not achieve shaving comfort is directly contrary to the unrefuted testimony of Colonel Jones to the effect that such shaving comfort (and, consequently, a faster shave) is achieved by defendants' "whiskits," and is contrary to the finding of the District Court, and is contrary to fact, as can readily be demonstrated by any member of this Court by personally shaving with Exhibit 2, 3, 4 or 5. It is also contrary to the description of the

“whiskits” in defendants’ Meyer patent [Exhibit L-2] which defendants boldly admit (Opening Brief, p. 37) correctly “describes the purpose of the ‘whisk-its’ of defendants’ accused shavers,” among which is to provide such shaving comfort.

As shown above, Mr. Gray, chief engineer of defendant Schick, Inc., admitted that the end guards of the patent in suit will retain *some* of the beard clippings [Tr. 388]. Consequently, there is no foundation in fact for defendants’ argument that the end guards of the shaver of plaintiff’s patent in suit will not retain beard clippings. Even if this were not true, still the mere addition by defendants of an extra function (*i. e.*, collection of beard clippings) in addition to the functions of the end guards of the patent in suit obviously does not avoid infringement and is immaterial. As pointed out above, under the law the mere addition to a patented combination of something that does not detract from the function of the patented combination does not avoid infringement.

Finally, defendant Schick, Inc., has shown acquiescence in the fact of infringement by first offering \$50,000.00 in cash for the patent in suit and then by taking an exclusive license thereunder at a substantial royalty rate.

It is respectfully submitted that defendants’ accused devices plainly infringe all of the claims on appeal, and that such holding of the District Court was eminently proper.

POINT 4.

The District Court Properly Rejected the Testimony of the Witnesses Quasnovsky and Gray.

The District Judge heard the testimony of the witnesses in open Court, and he was best able to judge the credibility of their testimony. Several, among many, instances that support the District Court's finding are briefly given herewith as illustrations.

Mr. Quasnovsky on direct examination testified at length and in detail as to the dates on which various commercial dry shavers had been made and sold by defendant Schick, Inc. On cross-examination, however, he finally admitted that he could not identify which cutting heads went with which shavers [Tr. 311-312]! He also admitted, upon inquiry by the Court, that at the time of some of the events in question he was only eighteen years old [Tr. 322]. He also admitted that he had no relation to defendants' sales [Tr. 307].

As to Mr. Gray, he testified that defendants' "whiskits" do not act as "guards" to protect the face of the user [Tr. 363-364], although defendants' Meyer patent [Exhibit L-2] plainly states that they function to do so, and defendants now admit that the Meyer patent correctly describes the function of the defendants' "whiskits"! Furthermore, Mr. Gray testified that the paper punch receptacle of the conductor's punch, Exhibit N, functions exactly the same as the devices shown in the patent in suit, the defendants' Meyer patent, and defendants' Thomas patent [Tr. 374], yet he had earlier asserted that defendants' "whiskits" do not function the same as those of the patent in suit [Tr. 363-368]. Also, the witness on direct examination asserted that the end guards of the

patent in suit would not catch beard clippings [Tr. 360], but on cross-examination he finally admitted that at least some beard clippings would be caught by the device of the patent in suit [Tr. 388]. Also, upon direct examination, he stated that he had been chief engineer for defendant Schick, Inc., ever since 1938 [Tr. 333], but, upon subsequent questioning by the District Judge, he admitted that for an extended period after 1938 he had not been chief engineer [Tr. 392].

POINT 5.

The District Court Properly Held That the Infringement of Defendants was "Conscious, Deliberate, Wilful, and Wanton."

The District Court found, and the evidence is undisputed, that immediately after the issuance of the patent in suit the defendant Schick, Inc., upon its own initiative, offered plaintiff \$50,000.00 for his patent. The District Court also held, and the evidence shows, that the defendant Schick, Inc., being unable to purchase the patent in suit, entered into an exclusive license contract with plaintiff with the obligation to pay plaintiff very substantial sums as royalty during the life of the patent in suit. The evidence also shows that thereafter the defendant Schick, Inc., attempted to repudiate such license agreement and has since that time forth continued to manufacture and sell the accused dry shavers, brazenly ignoring plaintiff's rights. That the infringement by defendants, since at least as early as January 23, 1941, has been "conscious, deliberate, wilful, and wanton" is plainly shown by the foregoing facts. In addition to the foregoing, defendant Schick, Inc., trading on plaintiff's belief

in the existence of such license agreement between them, which was induced by defendant, induced plaintiff to disclose to it copies of two secret and pending patent applications, which plaintiff would not otherwise have done [Finding 24, Tr. 57-58]. This was a plain fraud upon the plaintiff and clearly shows the bad faith of defendant. That such facts are ample to support the District Court's finding is amply established by the law. *See: Activated Sludge v. Sanitary Dist. of Chicago*, 64 Fed. Supp. 25, 34 (D. Ct. Ill. 1946; aff'd 157 F. (2d) 517; cert. den. 330 U. S. 834); *W. S. Godwin Co. v. International Steel Tie Co.*, 29 F. (2d) 476, 478 (C. C. A. 6th, 1928); *Consolidated Rubber Tire Co. v. Diamond Rubber Co. of N. Y.*, 226 Fed. 455, 463 (C. C. A. 2d, 1915).

There is no evidence in this action that such long infringement has been engaged in by either of the defendants with any belief that they were acting innocently, nor is there any evidence whatever as to why they have brazenly continued such infringement in derogation of plaintiff's rights. While apparently one of their patent counsel advised them that no infringement existed [Exhibit C], the evidence falls entirely short of showing that either of the defendants acted upon any belief in such advice. If, in fact, the executive officers of the defendants believed that their corporations were acting innocently, why was not evidence thereof presented in this case? None of the officers of either defendant testified in this action. Under the law, it may be presumed that if they had so testified their testimony would have been unfavorable to the defendants on this issue. *See: Interstate Circuit v. United States*, 306 U. S. 708, 59 S. Ct. 467, 83 L. Ed. 610; *Hann v. Venetian Blind Corp.*, 111 F. (2d) 455, at 459 (C. C. A. 9th, 1940).

It is submitted that there is substantial evidence of bad faith on the part of defendant Schick, Inc., and that there is no evidence whatever that either of the defendants were acting in good faith. Under such circumstances, the finding of the District Court should not be disturbed. See: *Overman Cushion Tire Co. v. Goodyear Tire & Rubber Co., Inc.*, 66 F. (2d) 361, 362 (C. C. A. 2d, 1933); *Van Kannel Revolving Door Co. v. Uhrich*, 297 Fed. 363, 369 (C. C. A. 8th, 1924).

Conclusion.

The invention in suit is simple but valuable and the defendants have boldly appropriated it, forcing the plaintiff into protracted and expensive litigation which has been pending since July 6, 1945. Certainly, the conduct of the defendant Schick, Inc., in its relations with plaintiff provides to him all of the equities in this case. Even without considering such equities, however, we respectfully submit that claims 22, 23, 31 and 32 of the patent in suit are plainly valid and clearly infringed. The judgment of the District Court in plaintiff's favor should be affirmed.

Respectfully submitted,

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